Office - Supreme Court, U.S.
FILED
[illegible]
ALEXANDER L. STEVAS,
CLERK

No. 81-221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INNKEEPERS OF NEW CASTLE, INC.,
Petitioner,

vs.

ROBERT J. MALEY, ALEXANDER HAMILTON
LIFE INSURANCE COMPANY OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT ROBERT J. MALEY'S BRIEF IN OPPOSITION

Robert J. Maley
HARRINGTON, MALEY, GARDNER
& SAYER
Third Floor, Peoples Building
Richmond, Indiana 47374
(317) 966-0642

Counsel for Respondent,
Robert J. Maley

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals committed error in holding that an attorney's contingent fee contract to conduct state court litigation and the resulting attorney's charging lien on the judgment finally obtained in that litigation would be examined pursuant to state law, when the contract predated the institution of proceedings under Chapter XI of the Bankruptcy Act of 1898 by many years and the then pending litigation was turned back over to the debtor to proceed with outside of the bankruptcy administration, by order of court?

TABLE OF CONTENTS

		Page
Question Presented for Review		i
Table of Authorities		iv
Statement of the Case		2
Reasons why the Writ should be denied		5
1.	Summary of Argument	5
2.	The Court of Appeal's decision does not conflict with the Bankruptcy Rules	11
3.	There is no ligitimate relationship between the instant case and the recent decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*	13
4.	The Court of Appeal's decision does not stand as precedent for the proposition that every executory attorney fee contract predating bankruptcy is not reviewable unless first affirmatively rejected	14
5.	There was no improper abandonment by the Bankruptcy Court of its jurisdiction to determine attorney fees by ordering the debtor to proceed with pending litigation in state court thereby requiring application of state law to the attorney's contract and lien	16
6.	There is no error in the Court of Appeal's decision as it deals with jurisdiction over the property of the debtor-in-possession and the distinction between debtor-in-possession and debtor, and the abandonment of property to the debtor	18

7. There is no error in the Court of Appeal's interpretation of Indiana law relative to attorney liens nor in its application of §107(C)(1)(B) of the Bankruptcy Act 20

8. There is no conflict between the decision of the Seventh Circuit Court of Appeals and decisions in other circuits on the issue of jurisdiction conferred on bankruptcy courts to fix the compensation of counsel in similar factual situations 22

9. The factual situation is unique and not likely to recur 24

10. The case is of relevance and importance only to the litigants 25

Conclusion 27

TABLE OF AUTHORITIES

Cases:	Page
Brown v. Gerdes, 321 U.S. 178 (1944)	16
Carter v. Woods, 433 F.Supp. 291, (W.D. Mo. 1977)	12,15
Conrad, Rubin & Lesser v. Pender, 289 U.S. 472 (1933)	13
Friedman v. Harris, 158 F.2d 187 (C.A.D.C. 1946)	20
In re Diplomat Electric, Inc., 499 F.2d 342 (5th Cir. 1974)	22
In re Land Investors, 554 F.2d 925 (7th Cir. 1976)	23
In the Matter of Four Seasons Nursing Centers of American, Inc., 357 F.Supp. 594 (U.S. Dist. Ct. W.D. Okla. (1973)	21
In re Pacific Far East Line, Inc., 654 F.2d 664 (9th Cir. 1981)	22
Jackson v. Vance, 179 F.2d 154 (10th Cir. 1949)	23
Johnson v. Collier, 222 U.S. 538, 32 S.Ct. 104, 56 L.Ed. 306 (1912)	16,19
Justice v. Justice, 115 Ind. 201 (1888)	21
Miedreich v. Rank, 40 Ind. App. 393, 82 N.E. 117 (1907)	21
Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 102 S.Ct. 2858 (1982)	8,13,14
Official Creditors' Committee of Fox Markets v. Ely, 337 F.2d 461 (9th Cir. 1964)	23
Sanders v. Providence Washington Insurance Company, 442 F.2d 1317 (8th Cir. 1971)	22
Securities and Exchange Commission v. Crumpton Builders, Inc., 337 F.2d 907 (5th Cir. 1964)	16

Sherman v. Buckley, 119 F.2d 280 (2nd Cir. 1941)... 17

State ex rel. McNabb v. Allen Superior Court No. 2, 225 Ind. 402, 75 N.E. 2d 788, (1947)..... 21

Federal Statutes

Bankruptcy Act of 1898, §67(c)(1)(B), 11 U.S.C.A. §107(c)(1)(B)(1976).....9,21

Bankruptcy Act of 1898, §107(c)(5), U.S.C.A. §107 (c)(5).....20,21

Rules of Bankruptcy Procedure

Bankruptcy Rule 11-22..... 12

Bankruptcy Rule 11-31..... 12

Bankruptcy Rule 22-31..... 19

Bankruptcy Rule 215.....11,12

Bankruptcy Rule 219.....11,12,13

Bankruptcy Rule 220.....12,13

Miscellaneous

9 AMERICAN JURISPRUDENCE, 2nd Series, Bankruptcy, §877..... 17

14 COLLIER ON BANKRUPTCY, §11-103, (14 ed.) 12

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 445, (1977), U.S. Code Cong. & Admin. N. 1978, p. 600 11

No. 81-221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INNKEEPERS OF NEW CASTLE, INC.,
Petitioner,

vs.

ROBERT J. MALEY, ALEXANDER HAMILTON
LIFE INSURANCE COMPANY OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT ROBERT J. MALEY'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Certain facts were omitted or distorted in Petitioner's Statement of the Case which are necessary to accurately depict the unique factual situation here involved. Most simply stated, the record supports the statement that follows.

A litigation attorney (MALEY) was employed in 1971 by a corporation (INNKEEPERS) under a valid and subsisting contingent fee contract to pursue an action in eminent domain in state court on behalf of a corporate client. After extensive proceedings in the state court, including successfully obtaining key rulings on pretrial motions, the attorney "had for all practical purposes completed his legal services by obtaining a favorable pretrial stance and developing a trial strategy and proposed trial expert evidence of damages..." and the trial was scheduled to begin on December 6, 1976.[1] The corporate client (INNKEEPERS), employing the services of another law firm (BAMBERGER & FEIBLEMAN) with expertise in bankruptcy proceedings, because a mortgage foreclosure action had been filed against it, filed a Chapter XI petition twenty-six days before the trial date of the condemnation action. BAMBERGER & FEIBLEMAN, on behalf of INNKEEPERS, filed a petition and obtained an order from the Bankruptcy Judge authorizing INNKEEPERS, as *debtor*, to proceed with the condemnation action in state court. At this time "all that was left to be done (by the attorney to complete his services required of him under his contract) was to put that legal work product to play during a short two day trial."[2] The trial resulted in a substantial judgment in favor of

---

[1]Opinion of Court of Appeals 671 F.2d at 229 Appendix, p.A-16

[2]Opinion of Court of Appeals 671 F.2d at 229 Appendix, p. A-16

INNKEEPERS to which the litigation attorney (MALEY) immediately perfected his attorney's lien for fees. An appeal to the Indiana Court of Appeals reversed the trial court and he appealed to the Indiana Supreme Court which reinstated the judgment. The Court of Appeals decision points out that these appeals were forced upon the attorney and that he served "with remarkable expertise with no additional fee."[3] The first payment on the judgment was made on the 9th day of November, 1979, and the Bankruptcy Judge ordered that those funds be turned over to the debtor-in-possession under supervision of the bankruptcy court, and invested.[4] This order preserved the attorney's lien on the funds as fully as if they had remained in the possession of the Clerk of the state court.

The bankruptcy court at that time ordered the attorneys asserting liens against the condemnation award proceeds to file their application for allowances for attorneys' fees in connection with the judgment. By the same entry BAMBERGER & FEIBLEMAN were directed to file their application for interim allowances.[5] The application of BAMBERGER & FEIBLEMAN for $27,500.00 interim attorney fees for services to the debtor-in-possession, and $2,952.91 for expenses, was allowed in full as an expense of administration.[6] The application of MALEY for payment of his attorney fee pursuant to the contingent fee contract of 1971 as a lien on the judgment and out of the proceeds of that judgment, was set for formal hearing by the court. Objections and briefs in opposition were filed by the attorneys for Alexander Hamilton Life Insurance Company of America and by the firm of Friedlander, Mierhoof & Ancel, P.C., the law firm of which the present

[3]Opinion of Court of Appeals 671 F.2d at 229 Appendix, p. A-16

[4]Record, Vol. 1, pp. 111-114.

[5]Record, Vol. 1, p. 116

[6]Record, Vol. 1, p. 309

petitioner's special counsel, Steven Ancel is a member, on behalf of his client, Citizens State Bank, a secured creditor. These proceedings resulted in the Recommendations entered by the Bankruptcy Judge on July 24, 1980.[7] These Recommendations made certain specific findings of fact which are here pertinent. The Bankruptcy Judge found:

> There has been no evidence in this case that applicant Maley's 50% contingent fee contract was unfair or did take undue advantage of his client. Applicant Maley had already made a similar agreement with the President of the debtor corporation, Andrew Tabor, individually, for similar litigation. Innkeepers of New Castle was also, apparently, unable and unwilling to compensate Maley on an hourly basis. The evidence also showed that this contract is a normal type of arrangement for fees in condemnation proceedings, expecially [sp] when the chances for a substantial recovery are not great. Therefore, it appears that the contingent fee agreement was a fair one under the circumstances based upon the standards provided by Indiana law...[8]
>
> Applicant Maley was well qualified to handle all of the legal matters that arose during the entire condemnation proceeding. At the present time, he has been engaged in the practice of law some 24 years and, during that time, has specialized in litigation matters. Maley also testified that since he has begun practice, that he had handled more than one hundred eminent domain proceedings. Counsel with these skills was required in the condemnation proceeding because of the intricacy and novelty of the legal questions that arose during the condemnation proceedings at the trial court level and at the Indiana Court of Appeals and the Indiana Supreme Court. These skills were best evidenced by the result obtained by applicant Maley in securing a favorable decision at trial and on appeal.

---

[7]Appendix, pp. A-26-54

[8]Recommendations, Appendix, p. A-40

> Much time and effort have been devoted by applicant Maley to this cause over a period of some ten years. When Maley was retained by the debtor to pursue the debtor's rights, the probabilities for the success ultimately gained were very slight. The legal questions and maneuvering encountered were successfully overcome and, as a result, not only was new law made in Indiana but the assets of the estate of the debtor were greatly increased.[9]

The bankruptcy court based its decision solely on the conclusion that it had jurisdiction to determine the validity of the attorney's lien because it had jurisdiction over all of the property of the debtor-in-possession, including the proceeds of the condemnation judgment. It had taken jurisdiction of the condemnation proceeds by an agreed order to sequester, which order was agreed to by BAMBERGER & FEIBLEMAN as attorneys for the debtor-in-possession, Steven Ancel as attorney for Citizens State Bank and the attorneys for the first mortgage holder, Alexander Hamilton Life Insurance Company of America. Once having taken possession of the funds pursuant to that order the court found it unnecessary to determine the validity of the attorney's lien on the judgment since it was to order that the attorneys' fees were to be paid as a matter of first priority as an administrative expense. The District Court adopted the Recommendations of the Bankruptcy Judge in toto, and the appeal to the Seventh Circuit, which is here challenged, resulted.

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY OF ARGUMENT

The Court of Appeals' decision in the instant case deals with a peculiar and unique situation. An action in eminent domain pending in the state court was set for trial at the

---

[9]Appendix, p. A-48

time the land-owning corporation sought legal assistance from bankruptcy attorneys following the institution of a mortgage foreclosure action against it. The corporation under directions of its bankruptcy attorneys instituted a Chapter XI proceeding. The bankruptcy attorneys, and presumably the bankruptcy court as informed and influenced by the bankruptcy attorneys, did not want the debtor-in-possession burdened with what appeared to be fruitless and risky litigation. The state condemnation action was turned over to the *debtor* within a month after the bankruptcy proceedings had begun, on the very day the eminent domain case was set to proceed to trial by jury in the state court. This was a safe procedure for the debtor-in-possession since the estate could not be adversely affected. No expenses could be incurred by the estate since the litigation attorney was bound by his contingent fee contract, and the entire risk of loss fell on his shoulders. It was only after a successful judgment in the condemnation case that the attorneys for the secured creditors and the bankruptcy attorneys representing the debtor-in-possession became interested in the matter and proceeded to enter a so-called "agreed order" sequestering any fund resulting from the judgment. The application for Authority To Invest Condemnation Award Proceeds, filed with the court and distributed to all counsel of record, contained a photocopy of the judgment with the attorneys' liens written upon its face.[10] Respondent's lien set forth the specific amount of the lien pursuant to a written contingent fee contract. The debtor-in-possession's Statement of Affairs also set forth the respondent's lien under his contingent fee contract, together with its terms.[11] Thereafter, the attorneys for the debtor-in-possession did nothing regarding the eminent domain case other than

[10]Record, Vol. 1, pp. 104-110

[11]Record, Vol. 1, pp. 52, 55, 57, 75, 85

report periodically to the court that the matter was on appeal in the state courts. The attorneys for the secured creditors likewise did nothing but inquire as to the progress of the appeals. No one, including the court, voiced objection to respondent's handling of the difficult and protracted appellant procedures which first resulted in a reversal in the Court of Appeals and finally in an affirmance of the judgment in the Indiana Supreme Court. Further proceedings in the state court were necessary to collect the judgment and to collect additional interest thereon. Respondent was not paid any fee or reimbursed for his considerable expenses in the handling of the state court litigation and appeals. It was not until after the first payment on the judgment that the court ordered respondent to file his application for fees. Respondent proceeded upon a petition for payment of fees and honoring of his state court lien on the judgment. Only at this point did the secured creditors challenge respondent's contingent fee, contract and asserted lien based thereon. The attempt of the secured creditors, which reeks of unfairness and inequity, to sit back and do nothing thereby allowing MALEY to continue his efforts in the state court action and carry the burden, risks and costs throughout a lengthy appeal process and only then challenge his prearranged fee was not joined by INNKEEPERS. The president of INNKEEPERS in fact testified in open court that he intended to honor the contract. The debtor-in-possession never repudiated its contingent fee contract with the respondent and presented no opposition to his petition for payment of his fees based upon the contract and lien at the hearing.

The Bankrupcty Judge recognized that the factual situation was unique stating in his Recommendations: "The situation of applicant, Maley, is not the normal one to be confronted by the court..."

The decision of the Seventh Circuit Court of Appeals found that the bankruptcy court had assumed jurisdiction

over the proceeds of the judgment and thereupon erroneously determined the amount of the attorney's charging lien pursuant to certain standards generally applicable to federal bankruptcy fee allowances. The Court of Appeals thereupon remanded the matter of the federal court to enter judgment pursuant to the Contract as valid under state law.

Petitioner urges that a writ of certiorari be granted, arguing that the Court of Appeal's decision stands as precedent for a denial of the jurisdiction of federal courts to determine fee matters in bankruptcy. Such an extended and far-reaching interpretation of the decision is not justified by the facts of the case.

Petitioner envisions that the jurisdictional power of the bankruptcy court to supervise the hiring of attorneys and the allowance of attorney fees in bankruptcy proceedings is challenged by the Court of Appeal's decision in the instant case in that it conflicts with the mandate of the Bankruptcy Rules, in particular Bankruptcy Rules 215 and 219. Respondent contends that the Bankruptcy Rules are not challenged but simply are not called into play by the particular factual situation here presented. Petitioner then argues that the bankruptcy court's authority to decide controversies regarding attorney fees is among the Article I powers of the bankruptcy court falling within "summary jurisdiction" and then extends from this argument an attempt to connect this case with the recent Supreme Court decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 102 S. Ct. 2858 (1982). Petitioner cites a statement of the court to the effect that bankruptcy courts are subject to some limitation in the exercise of their summary jurisdiction in circumstances such as those presented in this case. Respondent contends that the Court of Appeals was correct in distinguishing the facts in the instant case from those in which the bankruptcy court normally exercises summary jurisdiction. Next, the

petitioner erroneously asserts that the Court of Appeal's decision is precedent for the proposition that every executory attorney fee contract entered into prior to the commencement of a bankruptcy proceeding is binding and not subject to review unless the executory fee contract is first affirmatively rejected. Respondent would urge that such was not the holding of the Court of Appeals in that such a proposition goes far beyond the facts here presented and the Court's holding. Furthermore, the attorney fee contract was in fact reviewed by the Bankruptcy Court against both state standards and the so-called federal bankruptcy standards. The Court of Appeals remanded the case to the federal court, not to the state court, on the basis that the reviewing court has already made the necessary findings to establish the validity of the contract under state law. Petitioner also urges that the Court of Appeals' decision is authority for the principle that the bankruptcy court, in ordering debtor to proceed with pending court litigation, waived or abandoned its exclusive jurisdiction to determine attorney fees, which petitioner asserts is improper. Respondent would point out, however, that the court's *holding* is only that state law will determine the validity of a contingent fee contract and the lien arising upon the resulting judgment which occurs outside the administration of the bankruptcy estate.

Petitioner then asserts that the Court of Appeals was in error in determining that a chose in action does not become an asset of the bankruptcy estate; was in error recognizing the distinction between debtor and debtor-in-possession, and was in error in interpreting Indiana law and failing to properly apply §67(c)(1)(B) of the Bankruptcy Act. Respondent would assert that the Court of Appeals made no error in any of these regards and would further point out that no ligitimate assertion is made by petitioner which would be grounds for an issuance of a writ of certiorari for these reasons.

Petitioner urges that the Court of Appeals' decision conflicts with the decisions of courts of appeal for other circuits, which must be viewed as its prime assertion that the writ should be granted. Respondent would point out that none of the cases cited in support of this proposition represents a holding which conflicts with the instant decision, and in fact the 9th Circuit decision cited by petitioner actually supports the proposition that the attorney's lien and contract are to be determined by state law. The other decisions are based upon entirely different and distinguishable factual situations and present no conflict.

At many junctures of his argument counsel for the petitioner has urged that the factual situation in the instant case is a frequently "reoccuring" [sp] situation which deserves the attention of the United States Supreme Court. Respondent would submit, however, that the factual situation dealt with by the Court of Appeals is a singular and unique situation. Respondent recalls Judge Sufana's words: "The situation of Applicant Maley is not the normal one to (be) confronted by the court".[12]

Petitioner's attorney, Ancel, attempts to make the Seventh Circuit decision appear to have far-reaching significance as an attack on the supervisory power of the bankruptcy courts over attorneys. The case is indeed unique despite Mr. Ancel's assertations that the matter arises frequently. The problem of litigation pending when a bankruptcy petition is filed is usually resolved by discharging the litigation attorney and having the attorney for the trustee take over the litigation himself, thereby increasing his services and his fees. The litigation attorney, having been discharged, would be reluctant to give up his

rights under his contingent fee contract and accept employment by the trustee on some different basis. The Bankruptcy Act of 1978 removed any question concerning the employment of counsel on a contingent fee basis which alleviates the problem in the future. This position is reflected in House Report No. 95-595 referring to §328 of the new Act.[13] The situation where the pending litigation is dumped off on the debtor and his contingent fee litigation counsel generally occurs only where the bankruptcy lawyer can detect no reasonable opportunity for success and therefore no reasonable expectation of an increased fee. Such cases seldom come to the attention of the appellant courts for the reason the judgment of the bankruptcy attorney is usually accurate as to the value of the litigation, and no substantial fee develops under the contingency basis.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE BANKRUPTCY RULES

There is no issue presented which involves the application of Bankruptcy Rules 215 and 219. Bankruptcy Rule 215 provides that *no attorney for the trustee* or receiver shall be employed except upon order of the court. Rule 219(a) provides that a person seeking compensation for services *from the estate* must file an application, 219(b) requires a disclosure statement setting forth the compensation paid or promised to be paid for services rendered or to be rendered *in connection with the bankruptcy proceedings*, and 219(c) provides that compensation allowed an attorney entitled to compensation for services rendered in the *administration of a bankrupt's estate* shall be reasonable.

---

[13]This section authorizes the trustee, with the court's approval, to employ professional persons under any reasonable terms, including on a retainer, on an hourly, or on a *contingent fee basis* (emphasis added).

BR 11-31 reflects that BR 219 applies in Chapter XI cases and this is directed to the disclosure of fees paid or to be paid to attorneys representing the debtors-in-possession, but there is no reference available under Rule 219 as to the payment of fees by the debtor except for those fees which have been paid during the preceding year.

Collier on Bankruptcy, 14th Ed., Vol. 14, §11-103, recites that the second section of Rule 11-31 is of particular import in Chapter XI cases and finds no parallel in Bankruptcy Rule 219, and accordingly treated the same separately. Comments throughout such discussion constantly differentiate between attorney for the debtor and attorney for the debtor-in-possession. Rule 11-22 makes Rule 215 applicable to Chapter XI cases in the employment of attorneys for a trustee, receiver, debtor-in-possession, or creditor's committee. The simple fact is that the services rendered by respondent MALEY to the debtor were in no way rendered in administration of the debtor-in-possession's estate in the bankruptcy court.

Carter v. Woods, 433 F. Supp. 291 (W.D. Mo. 1977) was cited by the petitioners as authority. In that case the contract was made between the trustee and his attorney with Court approval *after* the voluntary petition in bankruptcy was filed. The district court refused to reverse the bankruptcy court's award of a sum less than provided by the contract holding that a bankruptcy court was not permitted to contract away its obligation to grant only reasonable compensation to attorneys for their services rendered in the administration of the bankrupt's estate. This is a distinctly different factual situation from the case at bar, which is a Chapter XI proceeding where proceedings are less formally supervised, and the contract *preceded* the proceeding in bankruptcy by many years. The bankruptcy court, in its Recommendations, recognized the inapplicability of Bankruptcy Rules 219 and 220, stating:

> ...Applicant Maley was first employed by the debtor some seven years prior to the initiation of these proceedings. On or about April 30, 1971 a fee agreement was entered into by the debtor and applicant Maley and said agreement was reduced to writing on or about January 5, 1976. These facts lend some credence to the argument that the fee agreement or the amount of fee generated do not run afoul of Bankruptcy Rules 219 and 220 when one of the main purposes of these rules is to protect creditors of the estate by providing a restraint on a bankrupt's opportunities to make unreasonable dispositions of his property through an arrangement for excessive payments for legal services. See: Conrad, Rubin & Lesser v. Pender, 289 U.S. 472, 53 S.Ct. 703, 77 L.Ed. 1327 (1933).

The Court of Appeals proceeded upon the simple premise that throughout the state court condemnation action MALEY was performing legal services for his client in its pre-Chapter XI status and thereafter in its status as debtor. None of the fee claims by MALEY relates to services for INNKEEPERS as debtor-in-possession in the administration of the bankrupt's estate.

THERE IS NO LIGITIMATE RELATIONSHIP BETWEEN THE INSTANT CASE AND THE RECENT DECISION IN *NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE COMPANY*

The Court of Appeals' decision cannot be interpreted as conflicting with the recent decision of this court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, supra, despite the convoluted attempts by petitioner's counsel to find reasons for granting the writ in the wording of that divided decision. Reduced to its most understandable essentials, petitioner's argument is that the Court of Appeal's decision has impermissibly stripped

the Bankruptcy Court of its jurisdiction to determine the allowance of attorney fees in a proceeding in bankruptcy. The Court of Appeal's statement that:

> Bankruptcy courts are subject to some limitation in the exercise of their summary jurisdiction *in circumstances such as those presented here.* (emphasis added) 671 F.2d at 230.

gave rise to petitioner's objections. The Court of Appeals pointed out that these special circumstances existed where the trustee or debtor-in-possession elects not to take over pending state court litigation, thereby avoiding subjecting the estate to any risk of loss. The pre-bankruptcy attorney fee contract, not having been terminated by operation of law upon the filing of a petition in bankruptcy, nor by action of the trustee or debtor-in-possession, remained in effect. When the bankruptcy court ordered the payment of the judgment proceeds into the bankruptcy proceeding, it exercised its summary jurisdiction, but by so doing stepped into the shoes of the state court.

The *Northern Pipeline* case merely acknowledges the existence of summary jurisdiction before the 1978 Bankruptcy Act, and was not confronted with any of the fact situations of the instant case.

THE COURT OF APPEALS' DECISION DOES NOT STAND AS PRECEDENT FOR THE PROPOSITION THAT EVERY EXECUTORY ATTORNEY FEE CONTRACT PREDATING BANKRUPTCY IS NOT REVIEWABLE UNLESS FIRST AFFIRMATIVELY REJECTED

The Court of Appeals' decision is not precedent for the generalized proposition urged by petitioner, to-wit; "That *every* attorney fee contract entered into prior to the commencement of a proceeding is binding upon the Court and is not subject to review unless the fee agreement is first affirmatively rejected" (emphasis added). The Court of

Appeal's decision is limited to its special facts. The Respondent's contingent fee contract was entered into in April 1971, over five years before the filing of the Chapter XI proceedings, and cannot be considered a contract for services in the administration of a bankruptcy estate made in contemplation of the filing of a proceeding in bankruptcy. The bankruptcy court's control over fee contracts for and in the administration of a bankruptcy estate was never in issue in this cause. Petitioner again cites *Carter v. Woods*, supra, and quotes the same passage quoted earlier in its brief. As previously pointed out, that case involved an attorney fee contract made by the trustee *during* administration of the bankruptcy estate.

Petitioner's attorney, Mr. Ancel, asserts that the Court of Appeals was in error in deciding that a contract for attorney fees entered into between a debtor and his counsel prior to the commencement of a Chapter XI proceeding is entitled to treatment generally afforded executory contracts under the Bankruptcy Act and could not tacitly be rejected. It is interesting to note that in the Objections to MALEY's fee application filed by Mr. Ancel's law firm on behalf of his client, Citizen's State Bank, it was stated:

> 4. That the contingent fee arrangement alleged in Robert J. Maley's application is, if anything, an executory contract which may be accepted or rejected in the herein proceedings pursuant to the Bankruptcy Act or rules.

Likewise in the brief filed in support of Citizen's State Bank's objections by Mr. Ancel's law firm, it was stated:

> "rejection or acceptance of an executory contract must be done within the framework of judicial action. The judicial formalities must be complied with."[14]

The holding of the Court of Appeals relative to MALEY'S

---

[14]Record, Vol. 1, p. 336

executory fee contract was not in error and cannot be extended beyond its specific import.

THERE WAS NO IMPROPER ABANDONMENT BY THE BANKRUPTCY COURT OF ITS JURISDICTION TO DETERMINE ATTORNEY FEES BY ORDERING THE DEBTOR TO PROCEED WITH PENDING LITIGATION IN STATE COURT THEREBY REQUIRING APPLICATION OF STATE LAW TO THE ATTORNEY'S CONTRACT AND LIEN

Petitioner questions the ability and right of the bankruptcy court to authorize the debtor-in-possession to abandon risky pending state court litigation and to authorize the debtor to proceed with the pending litigation outside and apart from the administration of the estate of the debtor-in-possession in the bankruptcy court. Petitioner attempts to find support for its argument in the decision of *Brown v. Gerdes*, 321 U.S. 178 (1944), but that case involved a Chapter X proceeding where the bankruptcy court authorized the debtor to prosecute an action in state court and to be *substituted as plaintiff*, and also authorized the retention of attorneys to pursue that suit. The bankruptcy court unquestionably retained the duty to pass on the fees of the attorney for the trustees under those circumstances.

Securities and Exchange Commission v. Crumpton Builders, Inc., 337 F.2d 907 (5th Cir. 1964), relied upon by petitioner, is not a precedent which applies to the factual situation in the instant case. Furthermore, Chapter XI proceedings are different in nature than Chapter X proceedings and are by their very nature subject to minimum control by the courts.

This court in the case of *Johnson v. Collier*, 222 U.S. 538 (1912), 56 L. Ed. 306, 32 S. Ct. 104, dealt with the right of a bankrupt to pursue litigation in state court after the filing of a bankruptcy petition. The court said, 222 U.S. at 540:

> If, because of the disproportionate expense, of uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some states... if money or property is finally recovered, it will be for the benefit of the estate.

It is stated at 9 American Jurisprudence, Bankruptcy, §877, p. 661, 662:

> The Bankrupt, upon the abandonment of the cause by the trustee, is entitled to continue the pursuit of the action, albeit a recovery in the suit may benefit the estate and not him.

The Court of Appeals recognized the abandonment of the cause of action by the debtor-in-possession as one of the three options available in the bankruptcy court in a situation dealing with pending litigation, which options had been outlined in the case of *Sherman v. Buckley*, 119 F.2d 280 (2d Cir. 1941).[15] Paraphrasing the court's statement, these options, available to the attorneys for the debtor-in-possession, were:

> (a) Discontinue the litigation and dispose of the debtor's chose in action as best they could. In this case the attorney's valid fee contract would have to have been affirmatively rejected and would have had to have been liquidated (on a quantum meruit basis).
>
> (b) The debtor-in-possession could intervene in the state court condemnation action and take over the litigation. Then the debtor-in-possession could have retained the attorney, MALEY, under some mutually agreeable terms of employment or discharged him. Had he been discharged his valid fee contract would again have had to have been liquidated.

---

[15]Opinion of Court of Appeals, 671 F.2d at 228, Appendix, pp A-14, 15

(c) It could have left the litigation in status quo by leaving the debtor and its attorney to fight out the litigation at their own expense and then step in to claim the fruits of recovery, encumbered by MALEY's attorney's fee lien.

INNKEEPERS' bankruptcy attorneys chose the third option. The abandonment of the state court condemnation action subjected the whole of the litigation, including the settlement and liquidation of the attorney's lien charge based on MALEY's fee contract, to the jurisdiction of the Indiana courts to be determined under Indiana law. This was the only way the debtor-in-possession could avoid liquidiating MALEY's fee contract before any recovery in the suit was had and known.

THERE IS NO ERROR IN THE COURT OF APPEALS' DECISION AS IT DEALS WITH JURISDICTION OVER THE PROPERTY OF THE DEBTOR-IN-POSSESSION AND THE DISTINCTION BETWEEN DEBTOR-IN-POSSESSION AND DEBTOR, AND THE ABANDONMENT OF PROPERTY TO THE DEBTOR

Petitioner argues that the Court of Appeals held that the bankruptcy court had no authority to review MALEY's fee contract because it determined it was reversible error for the bankruptcy court to have utilized the factors normally considered in determining the reasonableness of attorney fees in bankruptcy proceedings reasoning that MALEY's services were not rendered as a part of the bankruptcy proceedings. Petitioner's counsel is offended by the statement of the Court of Appeals that MALEY never performed any legal services for the *debtor-in-possesion* but considered his legal services as being services for INNKEEPERS in its pre-Chapter XI status and thereafter in its status as *debtor*. From this he reasons that the decision of the Court of Appeals establishes an erroneous precedent for the legal proposition that in a

Chapter XI proceeding the "debtor" is a separate entity from the "debtor-in-possession" who may retain assets and administer them apart from the bankruptcy estate and outside the supervision of the bankruptcy court. Of course, the Court of Appeals' decision is not a precedent for such a proposition. Contrary to petitioner's assertions, the distinction between "debtor" and "debtor-in-possession" is well recognized. It was even recognized in these proceedings when the firm of Teague, Cole & Hamer began appearing in the Chapter XI proceedings in May of 1979, as attorneys for the debtor, without obtaining any authority from the court or filing any affidavit under the Bankruptcy Rules.[16] Furthermore, on January 30, 1981, INNKEEPERS, as *debtor*, petitioned for authority to employ and the court authorized the employment of special counsel Teague to represent the debtor. BAMBERGER & FEIBLEMAN, counsel for the debtor-in-possession, did not participate in the appeal.

The bankruptcy rule applicable to Chapter XI proceedings recognized the distinction between debtor and debtor-in-possession. Bankruptcy Rule 22-31 clearly demonstrates a complete differentiation between the attorney for the debtor and the attorney for the debtor-in-possession.

As to whether or not the debtor retained any interest in its chose of action, the eminent domain action in the state court, this court has held that the trustee in bankruptcy may prosecute any suit which was commenced by the bankrupt prior to the adjudication since he becomes vested by operation of law with the title of the bankrupt as of the date of adjudication. The court went on to hold, however, in *Johnson v. Collier*, supra:

> If, because of the disproportionate expenses, or uncertainty as to the result, the trustee neither sues

[16]Record, Vol. 1, pp. 1-43

> nor intervenes, there is no reason why the bankrupt himself should not continue the litigation.

Of course, as previously pointed out the trustee or a debtor-in-possession may abandon or refuse to pursue a law suit in state court, thereby permitting the debtor to pursue the action apart from the bankruptcy proceedings.

THERE IS NO ERROR IN THE COURT OF APPEAL'S INTERPRETATION OF INDIANA LAW RELATIVE TO ATTORNEY LIENS NOR IN ITS APPLICATION OF §107(C)(1)(B) OF THE BANKRUPTCY ACT

It is not necessary to resort to the doctrine that an attorney's lien on a judgment relates back to the commencement of the action to answer the argument Mr. Ancel advances that MALEY had no lien on the judgment. *Friedman v. Harris*, 158 F.2d 187 (C.A.D.C. 1946). The relationship back of MALEY's attorney's lien and its preference over the mortgages of Alexander Hamilton Life Insurance Company of America, holder of a first mortgage having priority over the mortgage of Mr. Ancel's other client, Citizens State Bank, was generally conceded in the brief filed on behalf of Alexander Hamilton Life Insurance Company in its cross-appeal filed and decided by the Court of Appeals. On page 12 of its brief it observed:

> "No one has questioned the validity or priority of the charging lien;..."

This reflects the general posture of this case from its inception. The Bankruptcy Judge did not find that the charging lien was invalid, but in its order transferred the lien to the proceeds of judgment paid over to the debtor-in-possession under court order and in its Recommendations determined that the validity of the lien was not really an issue since its order required the payment of the amount it allowed as a priority item as an expense of administration. The attorney's lien was created in the state court

proceedings which had been turned over to the debtor. Whether or not MALEY's attorney's lien existed or would have been binding on the bankruptcy court had the debtor-in-possession remained in control of the state court proceedings was never put in issue. Obviously the statutory lien was not the only lien or remedy available to the litigation attorney (MALEY).

An attorney's right to a fee may also be protected where a fund has been created by the attorney's efforts, out of which he is equitably entitled to compensation. *State ex rel. McNabb v. Allen Superior Court No. 2*, (1947) 225 Ind. 402, 75 N.E.2d 788, at 792; *In The Matter of Four Seasons Nursing Centers of America, Inc.* 357 F.Supp. 594 (1947 W.D.Ok. 1973). The early decision of *Miedreich v. Rank*, 40 Ind. App. 393 (1907), recognized that an attorney practicing in Indiana courts may, by virtue of the statute, acquire a lien upon the judgment which he obtains for his client, although such a lien is not his exclusive remedy. Equity will create and enforce a lien in his favor independent of the statute. The court stated, 40 Ind. App. 393 at 398:

> The reason for this rule is that the services of the solicitor have, in a certain sense, created the fund, and he ought in good conscience to be protected.

The equitable lien had priority over any lien created on the land from which the fund resulted after the attorney acquired or attempted to acquire a statutory lien. *Justice v. Justice*, 115 Ind. 201 (1888).

Mr. Ancel's principal argument is based upon a section of the Bankruptcy Act, quoted in his petition, which itemizes certain liens which shall be invalid against the trustee including a statutory lien not perfected at the date of bankruptcy. 11 U.S.C.A. §107(c)(1)(B). Mr. Ancel fails to quote the last part of the enactment which states in part as follows: "(5) This subdivision shall not apply to liens...against property abandoned by the trustee or

unadministered in bankruptcy for any reason and shall not apply to proceedings under §205 of this title, nor proceedings under Chapter 10 of this title unless an order has been entered directing that bankruptcy be proceeded with." 11 U.S.C.A. §107(c)(5).

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS AND DECISIONS IN OTHER CIRCUITS ON THE ISSUE OF JURISDICTION CONFERRED ON BANKRUPTCY COURTS TO FIX THE COMPENSATION OF COUNSEL IN SIMILAR FACTUAL SITUATIONS

Mr. Ancel, in seeking conflict among decisions of the Circuit Courts of Appeal, asserts that the 8th, 9th and 10th Circuits have generally held, in factual situations similar to the instant case, that the jurisdiction conferred on bankruptcy courts to fix the compensation of counsel is paramount and exclusive. He cites *In re Pacific Far East Line, Inc.*, 654 F. 2d 664 (9th Cir. 1981), which rests upon a different factual situation wherein the court allowed slightly less than the exact recovery called for in a pre-bankruptcy contract, and the litigation attorney had been appointed special counsel for the debtor-in-possession by the court to handle the proceedings. The court did hold, however, that both the bankruptcy court and the district court were in error when they determined the fee ($1,500,000.00) under federal bankruptcy standards as a reasonable fee and stated 654 F 2d at 670:

> But federal standards are not directly applicable; the lien was created by state law, and thus state law standards apply to its measure. *In re Diplomat Electric, Inc.*, 499 F.2d 342, 348-49 (5th Cir. 1974).

Since the attorney had not appealed the sufficiency of the fee the Court did not question its adequacy under the state law. The decision of *Sanders v. Providence Washington*

Insurance Co., 442 F.2d 461 (8th Cir. 1971) cited by petitioner is readily distinguishable in that it arose out of the proceeding to enforce an attorney's lien where the plaintiff was declared bankrupt in an involuntary proceeding instituted almost simultaneously with the damage action. The trustee in bankruptcy was substituted for the plaintiff in the lawsuit and the petition to employ the original counsel as special counsel was rejected by the referee in bankruptcy. Later, the bankruptcy court authorized the trustee to settle the lawsuit in federal court and the original litigation attorney filed his motion claiming compensation under his contingent fee contract. The case is authority only for the proposition that the discharged attorney must prosecute his claim for services as a pre-bankruptcy creditor of the bankrupt. It was simply an appeal from an order fixing attorney fees for the trustee's attorney who has engaged in litigation during the proceedings in bankruptcy, and the case involves only the application of bankruptcy standards of reasonableness to fees during administration. The case of *Official Creditors' Committee of Fox Markets Inc. v. Ely*, 337 F.2d 461 (9th Cir. 1975), dealt with a contract of employment by the trustee in a Chapter X proceeding and attorney for fees based upon a contingency basis. The case is authority only for the proposition that contingent fee contracts between a trustee and an attorney were invalid. Petitioner then cites *Jackson v. Vance*, 554 F. 2d 154 (10th Cir. 1949). In that case certain damage actions were instituted in state court and thereafter, within two or three days, the plaintiff was adjudged a bankrupt. The trustee employed attorneys of his own choice and was substituted as party plaintiff in the state court action. The case is authority for the proposition that the existing rights of the replaced attorneys for services were not extinguished but became claims to be determined in the bankruptcy proceedings.

The petitioner further seeks to find conflict between the instant decision and that in the case of *In re Land Investors*,

554 F.2d 925 (7th Cir. 1976). There the attorneys in the pre-bankruptcy litigation had agreed to a contingent fee basis, but the precise amount was not set forth. The court found that under those conditions the bankruptcy court had no real alternative but to determine a reasonable contingent fee and stated, 554 F.2d, at 932:

> We need not consider whether the state courts of Wisconsin may have had jurisdiction to determine and enforce appellant's lien because those courts did not purport to do so.

Upon examination, therefore, the cases cited by petitioner are not precedent for the proposition of law he asserts. Respondent contends, of course, that the Court of Appeals' decision in the instant case in no way challenges or threatens federal court jurisdiction to determine fees, for not only are the facts in the instant case special and unique, but the court's decision actually acknowledges that the bankruptcy court had assumed jurisdiction of the matter and therefore remanded the matter to the federal court for further proceedings. It did not strip the court of the jurisdiction it had assumed and send the matter to the state court for determination.

THE FACTUAL SITUATION IS UNIQUE AND NOT LIKELY TO RECUR

The debtor-in-possession and by inference the court and secured and unsecured creditors, chose the option to maintain the status quo in the condemnation case. The decision makes it clear from its analysis of the findings of the Bankruptcy Judge, that this course of action was taken for the reason that no one, including the debtor-in-possession or its bankruptcy counsel, the bankruptcy court or any of the creditors, had any hope that the litigation would have a successful result and carefully chose not to embroil the debtor-in-possession's estate in hopeless litigation with additional costs and expenses including attorneys' fees on an apparently hopeless pursuit.

It is the examination of the second option outlined by the Court of Appeals that makes this factual situation one that is unlikely to recur. Prior to the Bankruptcy Act of 1978 there was much doubt concerning the employment of attorneys for trustees (or debtors-in-possession) to pursue actions in state court under contingent fee arrangements. The cases are replete with situations where attorneys representing clients in litigation still pending at the time of bankruptcy proceedings had rejected the trustee's offer of employment on a noncontingent fee basis and had recovered their fee on a quantum meruit basis at that point. There is some authority for recovery of an amount measured by the prior contingent fee arrangement. It is fair to assume that the debtor-in-possession here did not believe the attorney could be employed under a contingent fee arrangement to continue the litigation and did not wish to burden the estate with fees should he elect to continue the litigation on a per diem basis if approved by the court; therefore, the debtor-in-possession elected the third option. Since the 1978 amendments to the Bankruptcy Act it is now clearly possible for the court to approve employment of counsel under a contingent fee basis. Presumably litigation counsel who have agreed to pursue *apparently* unrewarding litigation under a contingency fee contract would be willing to continue the same arrangement, if offered. In the instant case the debtor-in-possession and its counsel simply chose in effect to abandon all responsibility for the state court action knowing that its right to collect the proceeds once payable to the debtor would be undisturbed.

THIS CASE IS OF RELEVANCE AND IMPORTANCE ONLY TO THE LITIGANTS

This case is of importance only to the litigants. This is not a bankruptcy but rather a Chapter XI arrangement proceeding. The debtor-in-possession has never been insolvent. The funds which would have been available after payment of MALEY's fee under his contract plus the funds

expected from the sale of the Holiday Inn and the real estate, were more than sufficient to discharge all of the obligations of Innkeepers with a surplus payable to the stockholders. The principal stockholders of Innkeepers of New Castle, Inc., Andrew and Lucille Tabor, had engaged BAMBERGER & FEIBLEMAN to file proceedings under Chapter XII of the Bankruptcy Act which are pending in the same court. The plan proposed by BAMBERGER & FEIBLEMAN, as attorneys for INNKEEPERS in its Chapter XI proceeding, called for the surplus funds to spill over into Chapter XII proceedings where the assets were otherwise insufficient to pay creditors. Citizens State Bank is likewise a creditor in the Chapter XII proceedings. Citizens, although it had the status of a secured creditor of INNKEEPERS, became a prime opponent of MALEY's application for payment of his fee and lien throughout the Chapter XI proceedings, Mr. Ancel and his law firm participating in the evidentiary hearing and submitting extensive briefs and arguments on its behalf. Citizens may well fear that even if the pour-over plan is adopted in Innkeepers' Chapter XI proceedings the total funds available to pay Citizens may be eroded with the passage of time and a declining economy and ever-increasing administrative expenses. It was to the particular interest of Citizens State Bank that MALEY's lien on the eminent domain judgment proceeds be reduced, thereby creating greater surplus out of which its claims could be paid.

It is interesting to note that INNKEEPERS either as debtor-in-possession or debtor offered no opposition to MALEY's petition for payment of fees. The only opposition in the Bankruptcy Court hearings came from Citizens State Bank and Alexander Hamilton, secured creditors. It was only after the Bankruptcy Court reduced the payment to MALEY that INNKEEPERS employed a special counsel to appear in the Seventh Circuit proceedings and another special counsel, Mr. Ancel, in these proceedings. Mr. Ancel is, incidentally, the same attorney who has

appeared of record for Citizens State Bank throughout all of the proceedings. Respondent suggests that the dual representation of the attorney for Citizens State Bank and the petitioner herein may account for the extreme inventiveness and far-reaching aspects of his arguments for granting the writ of certiorari. Citizens State Bank can be categorized as a litigant although it did not join in the appeal decided by the Seventh Circuit Court of Appeals. It is of prime interest to Citizens State Bank that MALEY's fee be reduced because of its position as a partially secured creditor, and its counsel is thereby motivated.

CONCLUSION

Respondent respectfully submits that it is the stated policy of this Court to pass on only those issues which are properly presented within the case. Respondent concludes that Petitioner's numerous arguments seeking a matter to attract this Court's attention, resulting from Petitioner's counsel's strong motivations to reverse the court below, has caused him to lose sight of the distinction between the actual holding of a decision and mere principles of law recited in the opinion. These matters to which Petitioner's brief is addressed are not, in fact, the *precedent* it seeks to have reviewed. Precedent is, after all, a closely defined principle.

Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

Robert J. Maley
Harrington, Maley, Gardner
& Sayre
Third Floor, Peoples Building
Richmond, Indiana 47374
317/966-6643

Respondent Robert J. Maley